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Order upon Petition for Rehearing and Suggestion for Rehearing in Banc (United States Court of Appeals for the Ninth Circuit, August 16, 1993):

"United States Court of Appeals

for the Ninth Circuit

92-36635

FRED A JOSSI

Plaintiff-Appellant,

v.

EDWARD J. DERWINSKI, Secretary of U.S. Department of Veterans Affairs,

Defendant-Appellee.

O R D E R

Before: HUG, WIGGINS, and THOMPSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

DECISION UPON APPEAL: (United States Court of Appeals for the Ninth Circuit 92-36635, May 24, 1993):

United States Court of Appeals

for the Ninth Circuit

92-36635

FRED A. JOSSI,

Plaintiff-Appellant,

v.

EDWARD J. DERWINSKI, Secretary of U.S. Department of Veterans Affairs, Affairs,

Defendant-Appellee.

MEMORANDUM*

FILED: May 24, 1993

Before HUG, WIGGINS, and THOMPSON, Circuit Judges.

Fred A. Jossi appeals pro se the district court's summary judgment in favor of the

Secretary of the Department of Veterans Affairs ("Secretary") in Jossi's action for damages for breach of contract under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).[1] Jossi also appeals the court's denial of his request for leave to file an amended complaint. We have

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[1] The government actually filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) and not a motion for summary judgment pursuant to Rule 56. In its motion, however, the government referred to affidavits and exhibits attached to the motion. The magistrate judge and district court should therefore have treated the motion as one for summary judgment and notified Jossi that the motion would be so treated. See Fed. R. Civ. P. 12(b); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir.), cert. denied, 474 U.S. 826 (1985) Nevertheless, the record indicates that Jossi knew that matters outside the pleadings would be considered, see Grove, 753 F.2d at 1532-33, and that Jossi was able to submit his own affidavits and exhibits in opposition to the government's motion. Under these circumstances, we conclude that the district court's error does not warrant reversal.

jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I

Summary Judgment

We review de novo the district court's summary judgment. McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 539 (9th Cir. 1991), cert. Denied, 112 S. Ct. 1603 (1992).

Jossi contends the district court had subject matter jurisdiction over his action pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2). This contention lacks merit.

In pertinent part, the Little Tucker Act provides that the district courts have "original jurisdiction, concurrent with the United States Claims Court, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000.00 in amount, founded . . . upon any express or implied contract with the United States." Id. The question we must determine is whether there was an implied-in-fact contract between Jossi and the Secretary pursuant to which the Board of Veterans Appeals (BVA") was required to hold a hearing on Jossi's claim for benefits.[2]

To establish an implied-in-fact contract, Jossi had to show that he (1) rendered a

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[2] The record does not contain any evidence of an express contract between Jossi and the Secretary. Thus, we limit our inquiry to whether an implied-in-fact contract existed.

service on behalf of the Secretary that (2) conferred a benefit on the Secretary (3) with the expectation of receiving some benefit or payment in return. See Helash v. Ballard, 638 F.2d 74, 75 (9th Cir. 1980) per curiam) ("[t]he obligations of parties to a contract implied in fact, like those of parties to an express contract, must be supported by consideration"); Hill v. Waxberg, 237 F.2d 936, 938 (9th Cir. 1956) ("an implied contract results where one renders services at the request of another with the expectation of pay therefor, and in the process confers a benefit on the other"); accord Girling Health Syss., Inc. v. United States, 949 F.2d 1145, 1146-47 (Fed. Cir. 1991) ("to establish jurisdiction based on implied contract, an appellant must establish the elements of a contract, including consideration,

mutuality of intent, and definiteness of terms").

Jossi asserts that the BVA scheduled his hearing for a certain date, time, and place and that he agreed to appear as scheduled. He argues that a contract was thereby created. We disagree.

Jossi did not allege nor does the record indicate that Jossi furnished any consideration to the Secretary. Absent consideration, we agree with the district court that a contract between the Secretary and Jossi cannot be implied. See Helash, 638 F.2d at 75. Absent a contract, the district court lacked subject matter jurisdiction under the Little Tucker Act to adjudicate Jossi's claim. See 28 U.S.C. § 1346(a)(2); Girling Health Syss., Inc., 949 F.2d at 1146-47. Accordingly, the government was entitled to judgment as a matter of law.

II

Denial of Leave to Amend

We review for abuse of discretion the district court's denial of Jossi's request for leave to file an amended complaint. Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991).

At the hearing on the government's motion to dismiss, Jossi requested that he be allowed to amend his complaint to state a claim under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) if the court determined that jurisdiction was lacking under the Little Tucker Act. The magistrate judge denied the request, finding that Jossi's allegations did not support a claim for a constitutional or other tort.

In Bivens, the Supreme Court held that "individuals whose constitutional rights

are violated may sue federal officials for damages under the Constitution without specific statutory authority." Karamanos v. Egger, 882 F.2d 447, 451 (9th Cir. 1989). To state a claim under Bivens, a plaintiff "must plead more than a merely negligent act by a federal official." O'Neal v. Eu, 866 F.2d 314, 314 (9th Cir.) (per curiam), cert. denied, 492 U.S. 909 (1989). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

Here, Jossi's allegations show the BVA was at most negligent in failing to inform Jossi that the site of his hearing had been changed. See O'Neal, 866 F.2d at 314. Jossi's conclusory allegation that the BVA intentionally failed to inform his

of the change is insufficient to support a Bivens claim. See Ivey, 673 F.2d at 268. We accordingly conclude that the district court did not err by denying Jossi's request to file an amended complaint because amendment would have been futile. See Texaco, Inc., 939 F.2d at 798.

AFFIRMED.

ORDER upon written objections to the proposed findings and recommendations (NO. 91-307 JE, July 15, 1992)

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON"
NO. 91-307 JE

FRED A JOSSI,

Plaintiff,

v.

EDWARD J. DERWINSKI, Secretary of U.S. Department of Veterans Affairs,

Appellee.

O R D E R

PANNER, J.

Magistrate Judge John Jelderks filed his Findings and Recommendations on May 22, 1992. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party

objects to any portion of the Magistrate's Findings and Recommendations, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Mach., Inc., 656 F.2d 130, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the Magistrate Judge's Findings and Recommendations that defendant's motion to dismiss (#28) should be granted. Dismissal should be with prejudice. Plaintiff's motion for judgment of default is denied (#27).

IT IS SO ORDERED.

DATED this 15 day of July, 1992

OWEN M. PANNER

UNITED STATES DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS/ORDER (United States District Court for the District of Oregon #91-307-PA, May 21, 1992.

"IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON"

NO. 91-307 PA

FRED A JOSSI,

Plaintiff,

v.

EDWARD J. DERWINSKI, Secretary of U.S. Department of Veterans Affairs,

Defendant.

FINDINGS AND RECOMMENDATION/ORDER

JELDERKS, Magistrate Judge:

Pro se plaintiff Fred Jossi brings this breach of contract action against Edward Derwinski, Secretary of the United States Department of Veterans' Affairs (the VA). Plaintiff moves for judgment of

default. The VA moves to dismiss. I deny plaintiff's motion and recommend that defendant's motion to dismiss be granted.

BACKGROUND

Plaintiff, a former World War II prisoner of war, makes the following allegations in his amended complaint. The VA scheduled a benefits appeal hearing for him to take place at the Riggs Building in Washington, D.C., on October 31, 1990, at 2:00 p.m. The VA authorized plaintiff to reimburse Jeffrey Stanton, his "Individual Claimant Representative," for travel expenses incurred in accompanying plaintiff to that hearing. Plaintiff and Stanton confirmed by letter and telephone that they would be present at the hearing.

On October 31, 1990, plaintiff, Stanton, and several of plaintiff's friends arrived at the Riggs Building at 11:45 a.m. Following the VA's

instructions, at 1:00 p.m. they reported to the room where the hearing was scheduled to take place. The VA Board of Appeals did not appear for the hearing as scheduled because the hearing had been moved to another location. Mr. Stanton informed the VA that he and plaintiff would remain in Washington, D.C., for a hearing later that day or would return the next day, if the VA would agree to pay for the cost of meals, lodging, and changing their flight. The VA declined, and plaintiff and Stanton departed without having had the hearing. The VA subsequently apologized for the "misunderstanding and confusion" concerning the hearing and acknowledged that "the scheduling problems were the Board's fault," but declined to compensate plaintiff for any of the hearing-related expenses he had incurred.

Plaintiff alleges that, in agreeing to appear at the hearing, the parties created "an express contract and a contract implied in fact." He adds that he incurred significant travel expenses in order to fulfill his "obligation/promise and agreement" to attend the hearing. [Emphasis in original.] Plaintiff seeks recovery of travel expenses for himself and Mr. Stanton in the amount of $1,123.60, as well as damages for mental suffering caused by the alleged breach of contract in an amount to be determined at trial.

Plaintiff moves for default judgment against the VA. The VA moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

STANDARDS

1. Dismissal for failure to state a claim upon which relief may be granted

A federal court ruling on a motion to dismiss for failure to state a claim must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Because the court rules before it receives any evidence, motions to dismiss are disfavored. See C. Wright & A. Miller, Federal Practice and Procedure, § 1357 (1984). The court should construe the allegations in the complaint most favorably to the pleader. The issue is not whether a plaintiff will ultimately prevail, and the court should not dismiss a claim merely because the pleadings indicate that the likelihood of a recovery is remote. See Scheuer, 416 U.S. at 236.

> In appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).

2. Dismissal for lack of Jurisdiction

Federal Rule of Civil Procedure 12 (b)(1) provides for the dismissal of cases over which the court lacks subject matter jurisdiction.

DISCUSSION

1. Motion to Dismiss

a. Subject Matter Jurisdiction

Plaintiff seeks recovery of less than $10,000.00 on a breach of contract claim. Any jurisdiction this court could exercise in this breach of contract action would therefore be based on the Tucker Act, 28 U.S.C. § 1346(a)(2). That Act

confers concurrent jurisdiction to district courts and the United States Claims court over any

> civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....

The Tucker Act is a jurisdictional statute only, and does not itself create any substantive rights for money damages enforceable against the United States. United States v. Testan, 424 U.S. 392, 398 (1976). Entitlement to money damages in actions brought under the Act depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Id. at 400, quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl.

599, 607, 372 F.2d 1002, 1009 (1967). The Tucker Act provides a remedy only where claims for damages against the United States have been explicitly authorized. Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 739, 740 (1982).

In the present case, I have found no statute or regulation allowing plaintiff to recover expenses incurred to attend a hearing that did not take place under the circumstances alleged. Instead, 38 C.F.R. § 19.166 Rule 66 provides that "[n]o expenses incurred by an applicant, counsel, or witnesses incident to attendance at a hearing may be paid by the government." In the absence of any statute or regulation providing for compensation by the Federal Government for the damages plaintiff has sustained, this

court lacks jurisdiction, and the motion to dismiss should be granted.

b. Failure to State a Claim

Though my conclusion that this court lacks jurisdiction makes it unnecessary to reach the issue, I note that I would recommend granting the motion to dismiss even if this court had jurisdiction. The facts which plaintiff has alleged simply do not state a claim upon which legal relief may be granted.

Plaintiff no doubt incurred significant expenses in travelling to Washington, D.C., for a hearing which, through no fault of his own, did not take place. His frustration and sense that he has been treated unfairly are certainly understandable. Unhappily for plaintiff, however, the principle of damnum absque injuria appears to apply. That principle refers to "loss or injury which does not

give rise to an action for damages against the person causing it." Black's Law Dictionary 393 (6th ed. 1990). That plaintiff may be justifiably angered by the VA's actions concerning his hearing does not, in the absence of statutes or regulations authorizing relief, confer jurisdiction upon this court. Likewise, as troubling as the VA's conduct may have been to Mr. Jossi, changing a hearing location under the circumstances as alleged here does not give rise to a claim upon which relief may be granted.

In a supplemental memorandum filed after the hearing was held on the motions at issue, plaintiff contends that, if the VA's motion to dismiss is granted, he should be allowed to amend his complaint to allege a Constitutional tort. This argument fails, and dismissal of this action should be with prejudice. The

facts alleged simply would not support a claim for a Constitutional tort.

2. Motion for Judgment of Default

Plaintiff has moved for judgment of default based on the government's failure to file a timely response to his amended complaint. Under Fed. R. Civ. P. 55(e), no judgment of default may be entered against an agency of the United States "unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." This court lacks subject matter jurisdiction, and plaintiff's allegations fail to state a claim upon which relief may be granted. Plaintiff therefore cannot establish a right to the relief he seeks. I deny the motion for judgment of default.

CONCLUSION

Defendant's motion to dismiss (#28) should be GRANTED. Dismissal should be

with prejudice. I deny plaintiff's motion for judgment by default (#27).

DATED this 21 day of May, 1992.

John Jelderks

United States Magistrate Judge

LETTER FROM UNITED STATES CONGRESSMAN RON WYDEN TO MR. KENNETH EATON, CHAIRMAN OF THE BOARD OF VETERANS APPEALS:

"November 20, 1990

"Mr. Kenneth Eaton
Chairman
Board of Veterans Appeals
845 Lafayette Bldg.
811 Vermont Ave., N.W.
Washington, D.C. 20420

Dear Mr. Eaton:

I am writing on behalf of Jeff Stanton of the Vietnam Veterans of America, who represents veteran Fred A. Jossi, C#5501170.

According to Mr. Stanton, on October 31, 1990, Mr. Jossi appeared at the Riggs Bank

Building, room 641 at 2 p.m. for a hearing before the Board of Veterans Appeals. As suggested by the BOVA, Mr. Stanton and Mr. Jossi were present at the above location one hour before the actual hearing time.

Mr. Stanton claims that they waited until 2:40 p.m. before being notified that the hearing location had changed. They then were advised to take a taxi to the other location where Mr. Jossi's hearing would take place.

When they arrived at this location, they were told that they could use the remaining time from the allocated hour to present Mr. Jossi's case. This gave them less than 10 minutes for what was supposed to be an hour long hearing. Mr. Stanton and Mr. Jossi indicated they would stay for the hearing only if they were given a full hour and if the BOVA would provide

lodging for them as this would require them to change their travel arrangements and stay in Washington, D.C. overnight. Their request was denied, so Mr. Jossi cancelled the hearing and he and Mr. Stanton traveled back to Portland, Oregon, as originally planned.

I am very concerned about the apparent lack of sensitivity and professionalism shown in the handling of this case. I am requesting that Mr. Jossi be given an opportunity to appear before the BOVA before the end of this year. Mr. Jossi and Mr. Stanton have indicated they will travel to Washington, D.C.

However, I would suggest that they should not be required to pay the travel or lodging costs, as they are not at fault for the cancellation of the October 31st hearing.

Because of the obvious time constraints, I would appreciate your prompt attention to this matter. You may contact Erin Forell of my Portland office, 503-231-2300, for further information. Thank you for your attention to this situation.

With warm regards,

Sincerely,

RON WYDEN

Member of Congress

RW/ef

cc: Edward Derwinski

LETTER FROM SECRETARY OF VETERANS AFFAIRS EDWARD J. DERWINSKI, TO UNITED STATES CONGRESSMAN RON WYDEN, ADMITTING THAT THE PROBLEM WAS THE VA'S FAULT, BUT INCORRECTLY ARGUING THAT THERE WAS "NO LEGAL AUTHORITY" TO MAKE ME WHOLE FOR MY MONEY WHICH I SPENT IN RELIANCE ON THE VA'S PROMISE TO CONDUCT THE HEARING WHICH DID NOT TAKE PLACE:

"Dec 27, 1990

"The Honorable Ron Wyden
House of Representatives
Washington, DC 20515

Dear Congressman Wyden:

Thank you for bringing to my attention the November 20, 1990 letter you wrote to Kenneth E. Eaton, Chairman of the Board of Veterans Appeals, concerning a problem one

of your constituents experienced with the Board recently. As a result of your letter, I asked Mr. Eaton to investigate this matter and provide me with a report.

I have been advised that scheduling difficulties did occur when Mr. Fred Jossi and his service representative, Jeff Stanton, came to Washington for a personal hearing at the Board. Unfortunately, although the scheduling problems were the Board's fault, they were compounded by the fact that the veteran and his representative were on an extremely tight travel schedule (Mr. Jossi's hearing was scheduled for 2:00 p.m. and he had to leave the Board by 4:00 p.m. in order to catch a 5:00 p.m. plane back to Oregon). These factors, as I understand it, did not permit Mr. Jossi to present testimony before a panel of Board Members. Nevertheless, he was informed that

arrangements would be made to schedule him for a hearing before a traveling section of the Board when it came to Portland in May 1991. Additionally, he was informed that there was no legal authority under which the Board of Veterans Appeals or VA could pay for any of the expenses he or Mr. Stanton incurred as a result of his hearing in Washington.

I have also been told that a member of Mr. Eaton's staff has been in contact with Mr. Erin Forell of your Portland office as well as Mr. Jossi's service representative, Mr. Stanton, and as a result of several conversations, all of the parties involved agreed that the best solution to this problem would be to have Mr. Stanton present written arguments on behalf of Mr. Jossi. Once those arguments are received, his appeal will be processed on an expedited basis.

Mr. Eaton sincerely regrets and apologizes for the misunderstanding and confusion surrounding Mr. Jossi's October 31, 1990 Board hearing. However, both he and I are pleased that a satisfactory solution to the problem has been found.

Sincerely yours,

Edward J. Derwinski

EJD/sj

CERTIFICATE OF SERVICE

On November 15, 1993, 3 (three) true copies of my:

"PETITION FOR WRIT OF CERTIORARI"

were mailed by first class mail, postage prepaid, to the following parties:

1. The attorney for Secretary Jesse Brown and The Department of Veterans Affairs, at the following address:

   General Counsel (027)
   Department of Veterans Affairs
   810 Vermont Avenue, NW
   Washington, DC 20420

2. The attorney for the United States of America and Janet Reno, Attorney General of the United States, at the following address:

   Ms. Janet Reno
   Attorney General
   United States Department of Justice
   Tenth Street & Constitution Avenue, N.W.
   Washington, DC 20530

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 15th day of November, 1993.

Fred A Jossi
Pro Se ✓
4512 S.E. Monroe Street
Milwaukie, Oregon 97222
503/654-8986